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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Conservatorship of the Person of ANDREW MILLS.	
CAROL HOWARD, Petitioner and Appellant, v. ANDREW MILLS, Objector and Respondent.	D068763 (Super. Ct. No. 37-2014-00025362-PR-CP-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

The Law Firm of Steven M. Green and Steven M. Green for Petitioner and Appellant.

Albence & Associates, Christopher J. Albence, Keeley C. Luhnow and Lucas A. Woodward for Objector and Respondent.

Carol Howard[1] appeals a judgment denying her petition to establish a conservatorship, and to appoint herself as conservator, over the person and estate of her stepfather, Andrew Mills. Carol argues the judgment should be reversed for the following reasons: (1) the court erred in determining Andrew did not meet the criteria for a conservatorship under Probate Code section 1801[2] despite finding his nieces exerted undue influence on him with respect to the execution of certain estate documents; (2) the court arbitrarily ignored the testimony of an expert witness regarding Andrew's mental capacity; and (3) Andrew's counsel invited error by incorrectly representing the issue of undue influence was not before the court in an improper ex parte communication. In response, Andrew argues Carol does not have standing to raise these issues on appeal.

We conclude Carol's arguments lack merit, although she does have standing to assert them, and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Andrew was born in March 1915. Andrew joined the Navy at a young age and achieved the rank of Chief before leaving in 1945. He met Betty Mills in 1949 and they got married the following year. Betty had a daughter, Carol, who was four years old at

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1 We refer to Carol, and certain others herein, by their first names solely to avoid confusion. We intend no disrespect.

2 All further statutory references are to the Probate Code unless otherwise specified.

the time and he raised her as his own thereafter. Andrew also had two nieces, Carolyn Coleman and Debbie Mills, with whom he had limited contact over the years.[3]

Andrew worked for the postal service for the next 30 years, retiring in 1980. In 2006, when Andrew was 90 years old, Betty passed away. Thereafter, Andrew lived alone in a condominium he owned. Carol helped him pay his bills for about six months after Betty's death, after which Andrew was able to pay them on his own. Carol continued to check on Andrew on a regular basis, visiting several times a week and going to the condominium whenever she could not get ahold of him on the phone.

In August 2013, Andrew's knee gave out while he was in the bathroom and he fell, hitting his head on the bathtub tile. Carol encouraged him to go to the doctor to get his head checked after the fall but he refused to do so.

Around 5:00 p.m. on December 9, 2013, Carol attempted to call Andrew but was unable to get ahold of him for several hours. After driving over to check on him with her husband but being unable to access the condominium, Carol called the police. The police eventually accessed a window to Andrew's residence and he responded, stating he had just been sleeping.

A couple of days later, Carol and her husband again went to check on Andrew at the request of an out of state friend that could not get ahold of him on the phone. When they arrived, Andrew looked dazed and, shortly thereafter, had a seizure. Carol called the paramedics and they took Andrew to the hospital. The doctors determined he had the

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[3] Coleman claims the limited contact was largely because Betty kept them away from Andrew.

seizure because of a subdural hematoma, essentially blood pooling in his brain, due to the earlier fall. Andrew scored 14 on a Mini Mental Status examination, indicating severe mental deficiencies.

After a few days, the hospital transferred Andrew to another healthcare facility, where he stayed for approximately one month before going to stay with Carol at her home. In early February 2014, Andrew started acting unusually combative and argumentative towards Carol, prompting her to call his primary physician, Dr. Kater. Dr. Kater told Carol that Andrew had dementia and instructed her to take him to the emergency room. Andrew was again admitted to the hospital, where he was placed under constant supervision and prescribed medication for dementia.

After five days in the hospital, Andrew went to a skilled nursing facility. While there, Coleman began visiting Andrew regularly. Andrew was temporarily transferred to a hospital psychiatric ward on two separate occasions due to aggressive behaviors, likely due to a misunderstanding regarding the appropriate dosing of his medication. After getting back on the appropriate medication, however, his condition improved.

Andrew could not stay at the facility for more than 90 days, and Carol did not believe he could manage on his own at his home, so she began looking for other options, eventually selecting a newer residential facility. Andrew was transferred to the new facility in late April 2014 and placed on the secure memory care floor due to his dementia diagnosis. In order to help pay for the facility, Carol submitted paperwork, on Andrew's behalf, to the Veteran's Administration (VA) confirming Dr. Kater's diagnosis of dementia and seeking additional benefits.

Andrew told Carol he did not like the new facility and repeatedly told Coleman and Debbie he wanted to go home. Coleman and Debbie wanted to help Andrew and discussed moving him back home with Carol, but she felt he needed to stay at the facility for his own safety. Wanting him to be more comfortable there, Carol inquired about moving Andrew from memory care to assisted living. The facility would not move him out of memory care with the dementia diagnosis so Carol asked Dr. Kater to change his diagnosis.

Dr. Kater did change the diagnosis and Andrew moved to assisted living in June 2014. Shortly thereafter, Coleman came to the facility with a notary and paperwork for Andrew to sign giving her power of attorney over him. According to Coleman, Andrew wanted to change the power of attorney because he had asked Carol repeatedly to take him home and she had refused. The facility notified Carol and she arrived while Andrew was in the process of signing the papers. Carol called the police and they escorted Coleman out of the facility. After speaking with Carol, the police suggested she move Andrew's money from a joint account with her and Andrew's names on it into a separate account in her name only to prevent Coleman from exploiting him. Carol went to the bank that day and moved the money. A few days later, Coleman took Andrew to the notary's office to complete signing and notarizing the documents.

Around this time, in July 2014, Andrew received two additional Mini Mental Status examinations, scoring 24 on one conducted by Dr. Kater's office but only 18 on one conducted by Dr. Avery from Adult Protective Services. The director of the facility, at least two nurses at the facility, and Dr. Kater felt Andrew was ready to return home.

However, Andrew felt he could not do so because Carol still had control of his checkbook, wallet, and keys, so he asked his attorney to send her a letter asking her to return his personal items.

On July 30, 2014, Carol filed a petition for the appointment of a conservator over Andrew's person and estate, naming herself as the proposed conservator.

In August 2014, Dr. Addario, an expert hired by Carol with extensive experience in assessing mental capacity, conducted an hour-long examination of Andrew. Andrew demonstrated severe impairments in a clock drawing exercise and received a 20 on a Mini Mental Status examination, indicating mild to moderate impairments. Based on the exam, Dr. Addario concluded Andrew had good social and communication skills but severe impairments in judgment and analytical thinking making him easily susceptible to manipulation. Although he believed Andrew had recovered substantially from the subdural hematoma, Dr. Addario determined he still suffered from underlying brain disease which affected his ability to reason.

That same month, Andrew's attorney prepared revised documents for Andrew, again giving Coleman power of attorney. In early September, Carol filed a separate petition in probate court seeking to invalidate the powers of attorney and alleging fraud and elder abuse against Coleman and Debbie.

On September 12, 2014, Andrew met with his attorney again to discuss changes he wanted to make to his trust, namely removing Carol as a beneficiary and adding his two nieces, Coleman and Debbie, as beneficiaries, each taking one-third, with the remaining one-third going to Carol's daughter. Andrew was angry with Carol, at least in part

because she had removed the money from their joint bank account. Andrew's attorney prepared the new documents and Andrew executed them on September 16. By the end of September, Andrew had returned to his condominium, with the help of Coleman, and Steve Whitaker, an acquaintance of Debbie, had moved in to provide Andrew with full time care and assistance.

In December 2014, Dr. Silver, also an expert on dementia and capacity, examined Andrew. Andrew again had trouble with the clock exercise but scored 24 on the Mini Mental Status examination, indicating only mild cognitive impairment. Based on the exam, Dr. Silver concluded Andrew had some mental impairment but had sufficient mental capacity to make decisions for himself, including the decision of who should make decisions for him in the event he no longer could.

The court conducted a trial on Carol's conservatorship petition over several days in June 2015. Both Dr. Addario and Dr. Silver testified regarding their examinations of Andrew. Dr. Addario asserted the score Dr. Silver gave Andrew on the Mini Mental Status examination should have been lower based on the items Dr. Silver testified Andrew did not answer correctly. Dr. Silver asserted Dr. Addario had not done a thorough enough examination to draw the conclusions he had regarding Andrew's lack of capacity. Dr. Kater also testified, opining Andrew's condition had improved and he was no longer suffering from dementia. Andrew testified as to his own abilities and understanding of the issues before the court.

At the conclusion of the trial, the court gave a tentative decision, stating Carol had not met the high burden of clear and convincing evidence necessary to establish a

conservatorship over Andrew's person but noting it had not come to a decision as to undue influence, and asked each party to submit a proposed statement of decision. Andrew's counsel clarified only the conservatorship was before the court, as the issue of the validity of the documents, including whether they were invalid due to undue influence, was pending in a separate, trailing case in probate court. In response, the court clarified the determination of a conservatorship over Andrew's estate was also before it. Andrew's counsel reiterated his view of the scope of the issues before the court when submitting his proposed statement of decision, including statement in the cover email that "[i]t should be clear that the only matter before the court is the conservatorship of the person and estate of Andrew . . . . ¶ [t]he issue to the validity of the estate planning documents . . . was not before this court." Carol filed an objection to the email as an improper ex parte communication.

In its written statement of decision, the court declined to establish a conservatorship over Andrew's person or estate, concluding Carol had not presented clear and convincing evidence establishing Andrew fit the necessary criteria as required by section 1801. The court found Andrew to be alert and attentive, oriented to self, time, place and situation and aware of the issues before the court, and found his thought process to be organized. The court determined Andrew had experienced mild cognitive deficits as a result of the subdural hematoma and subsequent seizures, but his mental condition had improved over time and noted both Andrew's primary care physician and attorney testified they did not believe a conservatorship was necessary. However—although noting the validity of the documents was not before it—the court also stated the

powers of attorney and amended trust documents should be declared void because Coleman and Debbie had exerted undue influence over Andrew when they were signed in July, August and September 2014.

DISCUSSION

On appeal, Carol asserts the court should have granted her petition to establish a conservatorship based on its factual finding Andrew was subject to undue influence when he signed the powers of attorney and trust amendments. She also asserts the court improperly ignored the testimony of Dr. Addario regarding Andrew's mental capacity, basing its decision instead on Andrew's testimony at trial. Finally, she asserts Andrew invited error by including the message regarding the scope of the issues before the court along with his proposed statement of decision. Andrew refutes each argument and asserts Carol does not have standing to appeal. For the reasons set forth herein, we conclude Carol's arguments are without merit, although she does have standing to assert them.

I. Standard of Review

We review the court's decision regarding whether to appoint a conservator for an abuse of discretion and review any underlying factual findings for substantial evidence. (*Conservatorship of Ramirez* (2001) 90 Cal.App.4th 390, 401.) As with any civil appeal, we presume the order is correct and indulge all intendments and presumptions in favor of the order. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133). We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve conflicts in the evidence or inferences drawn therefrom. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.) Carol, as the appellant, bears the burden of providing a record affirmatively proving

substantial evidence does not support the judgment. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

II. Analysis

A. *Undue Influence*

We first address Carol's argument the court should have appointed a conservator over Andrew based on its factual finding Coleman and Debbie asserted undue influence on him in July, August and September 2014.

The court may establish a conservatorship over an individual's person if the person is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter. (§1801, subd. (a).) Similarly, the court may establish a conservatorship over an individual's estate if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. (§1801, subd. (b).) In either case, the standard of proof at trial is clear and convincing evidence. (§1801, subd. (e).) Further, the court may not establish a conservatorship over a person or their estate without making an express finding that doing so is the least restrictive alternative necessary for the protection of the individual. (§ 1800.3.)

The court applies a different standard when determining whether a specific testamentary document is valid. (*Conservatorship of Bookasta* (1989) 216 Cal.App.3d 445, 450 (*Bookasta*) [discussing the difference between conservatorship and testamentary capacity].) The court looks to the mental state of the individual in relation to the act of executing the document, asking whether the testator had sufficient mental capacity at that specific moment in time to understand the nature and ramifications of his or her actions.

(*Estate of Arnold* (1940) 16 Cal.2d 573, 586 (*Arnold*); see *Bookasta*, at p. 450.) A testamentary document may be set aside, or declared void, where the court finds another person exerted such undue influence as to effectively substitute his or her own will for that of the testator, thereby destroying the testator's free agency. (*Arnold*, at p. 577.)

Here, the court noted the issue of the validity of the trust documents was not before it, but also found Andrew was subject to undue influence on three specific dates in July, August and September 2014. The court also found, though, at least implicitly, that Andrew was capable of resisting undue influence at the time of trial. Substantial evidence supports the court's finding. The specific instances of undue influence occurred more than nine months before the trial. At trial, Andrew presented evidence indicating his mental condition had continually improved over the previous 18 months and that he was now capable of making his own decision and managing his daily care and finances with some assistance from a live-in caregiver. The court properly weighed the evidence before it and properly concluded Andrew did not meet the criteria necessary for establishing a conservatorship.

Contrary to Carol's position, the court's findings regarding specific instances of undue influence do not compel a different result. In *Bookasta*, *supra*, 216 Cal.App.3d at p. 450, the court concluded an individual being under a conservatorship at the time he or she executes a given testamentary document had *some* bearing on the question of testamentary capacity, but was not ultimately determinative of the individual's capacity because the two determinations required different tests. The reasoning of the court in *Bookasta* is equally applicable to the reverse situation here. The finding Andrew was

subject to undue influence at three specific moments in time nine months earlier was not, in an of itself, clear and convincing evidence that Andrew was, at the time of trial, more generally incapable of resisting undue influence and, thus, in need of a conservator over his estate. (See *Bookasta*, at p. 450; § 1801.) Further, the findings regarding undue influence have no bearing on the issue of whether the court should have appointed a conservator over Andrew's person, and Carol does not assert otherwise.

For the reasons stated, we conclude substantial evidence supports the court's determination a conservatorship was not necessary and the court did not abuse its discretion in denying the petition despite its factual findings regarding the undue influence exerted upon Andrew.

B. *Expert Testimony*

Carol also argues the court "arbitrarily and capriciously" ignored the testimony of her expert, Dr. Addario. Carol bases her argument largely on the statement of decision, arguing the court made findings as to Andrew's demeanor at trial but did not discuss the testimony of either expert, Dr. Addario or Dr. Silver.

Carol relies entirely on *In Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509 (*McKeown*) to assert the court erred in "arbitrarily and capriciously" ignoring the expert testimony. In *McKeown*, the appellant argued the court erred in its instruction the trier of fact—in that case, a jury—in a conservatorship trial regarding the weight afforded to expert testimony. (*Id.* at pp. 506-507.) The court concluded the instruction given correctly stated the trier of fact could reject an expert opinion if it was not believable, but incorrectly stated uncontradicted expert testimony was "conclusive and

binding" on the jury. (*Id*. at p. 507.) The court explained instead that the trier of fact *may* reject even uncontradicted expert testimony so long as it did not do so arbitrarily. (*Ibid*.) The court went on to note the near truism that a trier of fact should not disregard any testimony arbitrarily rarely required instruction. (*Ibid*.)

The record here does not indicate the court ignored the expert testimony, much less that it did so arbitrarily or capriciously. The statement of decision states the court reviewed the testimony of the parties and witnesses and all admissible evidence before rendering its opinion. There is no indication the "evidence" the court relied on did not include, among other evidence before the court, the capacity declarations and testimony of Dr. Addario and Dr. Silver. As we indulge all reasonable inference in favor of the judgment, we presume the court considered the testimony of the experts, weighing it against the other evidence presented at trial before making its factual findings. (See *In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133).

Further, to the extent Carol intended to assert there was not sufficient evidence to contradict Dr. Addario's opinion and thus to support the court's determination a conservatorship was not necessary, we disagree with that assertion as well. Dr. Silver and Dr. Kater's testimony directly contradicted Dr. Addario's testimony, and indicated Andrew's mental capacity, including his ability to care for himself and make financial decision, was not significantly impaired. Indeed, the same passage of the statement of decision discussed above also refers directly to the testimony of Dr. Kater.[4] That

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4 Carol argued at trial Dr. Kater was testifying as a percipient witness and not as an expert but the court could afford his testimony significant weight regardless. (See, e.g.,

testimony, along with Andrew's, is sufficient to support the court's determination Carol had not met the burden of establishing the need for a conservator under section 1801.

For the foregoing reasons, we conclude the court did not arbitrarily or capriciously ignore the expert testimony.

C. *Ex Parte Communications*

Carol also asserts Andrew's counsel invited error by including a message in his email transmitting his proposed statement of decision reiterating the only matter before the court was the conservatorship, and not the validity of the estate planning documents. Carol asserts the trial court improperly relied on the email in determining it would not decide the validity of the documents and finding it lacked the authority to determine whether Andrew was susceptible to undue influence. Carol does not cite any authority in support of her position and we do not find it compelling. (See Cal. Rules of Court, rule 8.204(a)(1)(B).)

"An ex parte communication is one where a party communicates to the court *outside* the presence of the other party." (*Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1013, fn. 2.) Counsel for all parties, including Carol, were copied on the email at issue here and the exact same issue had been addressed twice in open court, with Carol's attorney agreeing at the outset of trial the only issue before the court was the conservatorship, and not the validity of the trust documents. Further, Carol filed

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People v Follette (1925) 74 Cal.App. 178, 203 [citing cases establishing there is no preference or distinction in terms of the weight to be given to expert testimony versus other forms of evidence].)

an objection to the email a few days later, before the court issued its decision, such that the court may have ignored the email in any event.

Even if the email was improper and the court considered it, Carol does not establish it had any prejudicial effect, nor does she present any authority indicating reversal is appropriate based solely on this single email communication. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) Contrary to Carol's assertions, the court did determine Coleman and Debbie exerted undue influence on Andrew, but also correctly stated the "issue of the validity of the estate planning documents" was not before it. For the reasons set forth above, however, the finding regarding specific instances of undue influence did not necessitate a determination that Andrew was later incapable of resisting undue influence or that a conservatorship was necessary under the high evidentiary standard set forth in section 1801.

For the reasons stated, we conclude the email did not result in reversible error.

D. *Standing*

Finally, although we have already determined Carol's arguments are without merit, we briefly address Andrew's assertion Carol does not have standing on appeal.

Any party aggrieved by an appealable order or judgement has standing to appeal. (Cal. Code Civ. Proc., § 902.) In *Guardianship of Pankey* (1974) 38 Cal.App.3d 919, 926-927 (*Pankey*), the court confronted a similar question regarding standing in the analogous context of the appointment of a guardian. There, a maternal grandmother sought the appointment of a guardian for her four grandchildren and the paternal grandmother objected, the court overruled her objections, she appealed, and respondents

argued she did not have standing. (*Id*. at p. 923.) The court concluded she did, reasoning any person the legislature or court recognized as having an interest in appearing in the proceeding and guiding the court as to whether a guardianship was in the best interests of the children, which in that case included the paternal grandmother, also had standing to appeal the resulting decision. (*Id*. at pp. 926-927.) Here, Carol, Andrew's stepdaughter and undoubtedly an interested person, was statutorily entitled to file a petition to appoint a conservator, and actually did so. (§ 1820.) Thus, under the reasoning employed in *Pankey*, at pp. 926-27, Carol had an interest in the court's decision regarding her petition, was aggrieved by its denial, and has standing to appeal the judgment.

Andrew's reliance on *Conservatorship of Gregory D*. (2013) 214 Cal.App.4th 62, 67-68 (*Gregory D*.) to support his assertion Carol does not have standing is misplaced. In *Gregory D.*, the court-appointed attorney for a developmentally disabled adult, Gregory, filed a petition seeking guidance regarding the administration of a limited conservatorship over him. On appeal, his mother, who was not the conservator, argued the court violated Gregory's constitutional rights to liberty and privacy based on a visitation order and an order mandating the disclosure of certain medical, financial and personal records, and that the court lacked jurisdiction to terminate a particular supported living services care provider. (*Id*. at pp. 64, 67.) The court found the mother did not have standing as the alleged violations were of Gregory's rights and not hers. (*Id*. at pp. 67-68.) As her arguments did not relate to the petition to appoint the conservator, or to any analogous petition in which she had a valid legal interest, the court drew no

conclusions regarding whether she had standing to dispute an order granting or denying such a petition.

DISPOSITION

The judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.